Submission on Bill C-213

An Act Respecting Canadian Business Corporations

THE CANADIAN CHAMBER OF COMMERCE

SUBMISSION ON

BILL C-213
AN ACT RESPECTING CANADIAN BUSINESS CORPORATIONS

DECEMBER, 1973

The Canadian Chamber of Commerce is the national voluntary federation of some 700 autonomous Boards of Trade and Chambers of Commerce (the terms are synonymous) in communities throughout Canada. These community organizations, which make the decisions as to the policies of The Canadian Chamber of Commerce, exist to promote civic, commercial, industrial, and agricultural progress in the areas in which they operate and to promote good government at all levels.

In addition, the Chamber's membership includes some 2700 business firms and subsidiaries, comprising all sizes and types of enterprise across Canada, as well as 30 national trade, business and professional associations.

SUBMISSION ON

BILL C-213

AN ACT RESPECTING CANADIAN BUSINESS CORPORATIONS

to

THE HONOURABLE HERB GRAY

Minister of Consumer and Corporate Affairs

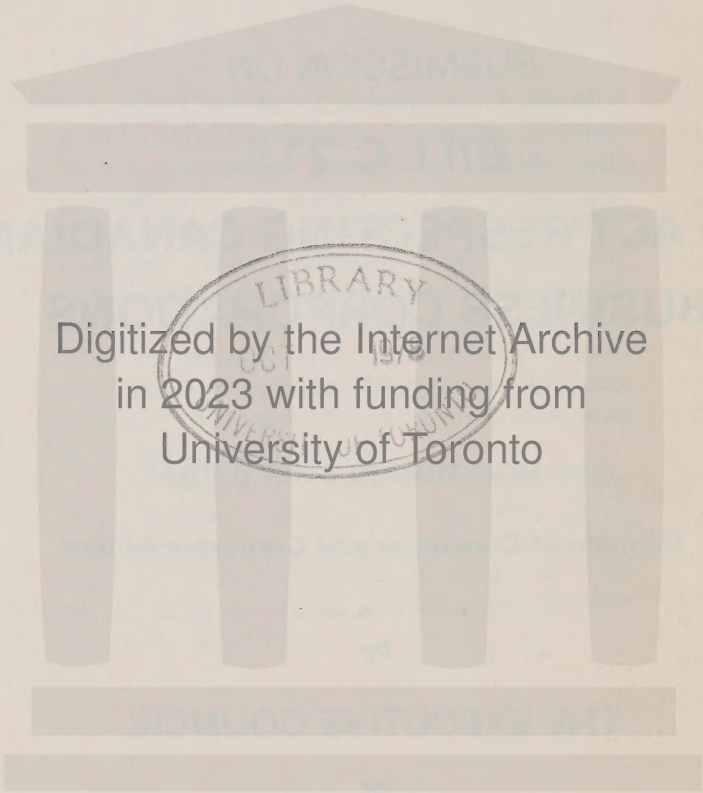
by

THE EXECUTIVE COUNCIL

of

THE CANADIAN CHAMBER OF COMMERCE

DECEMBER, 1973



The Canadian Chamber of Commerce is the national voluntary federation of over 700 community Boards of Trade and Chambers of Commerce throughout Canada. These community Boards and Chambers are established to promote the progress of the communities and districts in which they operate and to work for good legislation at all levels. The policies of the Canadian Chamber are set by these member Boards and Chambers.

The Chamber also represents some 2,700 corporate members and their subsidiaries composed of businesses of all types and sizes and in all geographic locations. Some 25 national associations are members of the Chamber.

The Executive Council is appointed by the National Board of Directors, the governing body of the Chamber to carry on the ordinary business of the Chamber in between meetings of the Board.

The Executive Council has reviewed Bill C-213 an Act respecting Canadian business corporations and welcomes this opportunity to present our views on this legislation.

We agree that there has been need for many changes in the present Act and generally consider this Bill as sound legislation.

Of particular value is that the Act is most beneficial in the simplification of procedures for incorporation and we strongly endorse the concept that now incorporation is a right rather than a privilege.

This Council notes with favour the extension of civil recourses under the Act but it is our belief that the new penalties that are being proposed are excessively severe. We do recognize the necessity of having penalties but our concern is that the severity of certain of the new penalties is completely unwarranted in a statute which is not criminal in nature.

Regarding shareholders' rights, the Executive Council approves of the Government's concern in this area but feels that the proposed legislation may have gone too far too quickly in the matter of shareholders' rights touching on shareholders' meetings, by-laws, the corporation's obligation to purchase a dissenting shareholder's shares and the right of a shareholder to take a derivative action. These issues are considered in detail later in this brief.

In the area of qualifications and obligations of directors, it is our observation that part IX setting out the provisions concerning the Canadian residency of directors, denotes on the part of the Canadian government the desire to use directors as an instrument of Canadian economic nationalism

We consider that the provisions of section 99(4) dealing with foreign controlled corporations which would disqualify resident Canadians, who happen to be employees of such corporations, should be deleted. It seems to us that the comments in section 200 of the Dickerson Report recognize the practical reality of the situation and moreover that section 99 (4) in effect would create a group of second class citizens and deprive capable Canadian senior

management of the opportunity of participating in the deliberations of the Board of Directors of the company employing them. We do not think it naive to suggest that the majority of employee directors can perform quite capably and that it is improper to infer that they are likely to be unduly subject to the influence of a majority shareholder, foreign or domestic.

Regarding the Securities legislation considered in this Bill, the Executive Council recommends that the Federal Government continue its effort to co-ordinate federal-provincial securities legislation with a view to achieving as much uniformity as possible across the country.

Another concern of the Council with respect to this Bill has to do with the fact that it appears to provide another instance of legislation by regulation. We are concerned that under the new proposed Act there are a number of significant areas where the statute itself is silent and these gaps are left to be filled by regulations. Not only does this make it difficult to interpret the full results of the Bill itself without a study of the regulations but, in consequence, the executive branch of the Government can, should it so choose, usurp certain of the authority of its legislative bodies. In general, the principle of government by regulation is a bad one.

The remainder of this brief develops these issues in relation to the pertinent sections of the proposed legislation.

SHAREHOLDERS' RIGHTS

Section 128 (1) (b)

While the Executive Council supports the concept of protecting the rights of minority shareholders, it submits that for any intelligent consideration of a matter to be given by a shareholders' meeting it is necessary that advance notice of the subject to be discussed be given. Accordingly, it is recommended that a shareholder must give notice to the corporation of a matter which he wishes to have discussed at a shareholders' meeting.

Section 97 (5)

The Chamber of Commerce questions the advisability of enabling a single shareholder to propose the amendment, repeal or enactment of a by-law of the corporation. Shareholders are presently protected by the requirement that such matters be submitted by the directors to the shareholders for their approval before they become effective. Further the provision is in seeming conflict with both Section 96 which charges the directors, as elected representatives of the shareholders, with the management of the business and affairs of the corporation and with Section 114 which prescribes the standard of care expected of a director and the circumstances under which he can be indemnified. A similar comment applies to the provisions in Section 165 (1) which enables a shareholder to propose an amendment in the articles of a corporation.

Section 180

The Chamber of Commerce has serious doubts about the wisdom of this section which permits a shareholder to dissent if the corporation proposes certain action, such as amalgamation, amending its articles, etc., and require the corporation to purchase his shares. We are unaware of the existence of any significant abuses in the past in Canada which this section is intended to correct and are concerned that it has simply been copied from the New York Business Corporations Law without much thought to the impact which it could have in thwarting the desires of the majority of shareholders. Plans approved by the majority of the shareholders could easily be interfered with if it is necessary to utilize part of the corporation's funds to purchase shares of dissenting shareholders.

Section 228

While the Executive Council considers the provisions giving rise to the right to bring a derivative action to be a progressive step, the right should be restricted to shareholders of the corporation at the time the cause of action arose. To do otherwise would be to invite a proliferation of frivolous law suits such as have existed in the United States for some time but which have been relatively unknown in Canada. It is submitted that this and the following Sections relating to derivative actions be carefully re-thought in order to avoid any possibility of "over-kill".

QUALIFICATION AND OBLIGATIONS OF DIRECTORS

Part IX sets out the following provisions:

1) S. 99 (3): "a majority of the first directors and a majority of the directors of a corporation must be resident Canadian";

2) S. 99 (4) where there is non-resident control of a corporation, not only must a "majority of the directors of the corporation.... be resident Canadians "but those Canadians must be persons "who are not employees of the corporation or its affiliate";

3) this is tempered somewhat in S. 99 (5) in the case of a holding corporation earning in Canada".... less than five per cent of the revenues of the holding corporation and all of its subsidiary bodies corporate" in which case "not more than one-third of the directors... need be resident Canadians; this concession is only granted if it appears justified after examination of the

"most recent consolidated financial statements of the holding corporation or the most recent financial statements of the holding corporation and its subsidiary bodies corporate".

Our concern over the method of achieving Canadian representation is that it is unduly restrictive and is largely ineffective since:

1) under S. 99 (2) "unless the articles otherwise provide a director of a corporation is not required to hold shares issued by the corporation"; the possibility raised here is that the controlling interest (s) may reach out and appoint persons who will be little more than docile instruments in which case little will have been gained by the exponents of Canadian nationalism;

2) in a closely-held foreign-controlled corporation other than the one contemplated in S. 99 (5) the use of unanimous shareholder agreements can render the Canadian resident majority rule largely ineffectual;

In certain cases the proposed residential requirements for directors may have a counter-productive effect on the flow of foreign capital into Canada.

We appreciate that certain jurisdictions

have even more stringent director requirements and that the proposed restrictions should also be considered not only in traditional Canadian terms but with an eye for practice elsewhere. In the final analysis, however, we do not feel there is any particular merit in imitating provisions found elsewhere unless the introduction of these concepts is truly beneficial to Canada's economy.

CONCLUSIONS

1. While recognizing the need to answer public demand for majority Canadian participation on a Board of Directors, we feel that the nationality or residence of a director is essentially a neutral factor and does not influence his performance as a director or his dedication to the success of the company on whose board he sits. Indeed, the presence of foreign-resident directors on Canadian boards, far from being a drawback, may often be a powerful stimulus to cross-pollination of ideas, methods and systems, from which Canadian corporations may derive substantial benefit.

2. We are concerned that the stress placed on Canadian residence in this Bill with respect to directors and the emphasis or over-emphasis it has received from various reviewers and commentators may

distract from consideration of more fundamental points. We believe that at the very least the provisions of section 99 (4) which disqualify resident Canadians who happen to be employees of foreign corporations should be deleted.

LEGISLATION BY REGULATION

Section 251 of the Bill stipulates that the Canadian Government ("the Government of Council") may "make regulations". In this regard, the Chamber is concerned over the wording of this section. We would comment as follows:

a) taking into account the fact that Parliament is supreme, we view with apprehension any provision that may remove from Parliament the real effective authority under the proposed Act;

b) we appreciate that, in certain fields, Parliament may have valid reasons to delegate certain technical or otherwise secondary or ancillary aspects of implementation of the Act such as, for instance, in consumer legislation; we feel that the Canada Corporations Act or any successor legislation to it does not easily lend itself to such a technique, inasmuch as this Act has been, until now a

very general Act, and we feel that those areas of this Bill which are concerned with securities details, and with securities regulation, might better be left out of this Bill;

c) in this connection the Chamber notes that, until now, securities legislation in Canada, which is technical in nature, has been covered by legislation which is separate and distinct from the governing provincial corporation acts; we feel there is wisdom in this distinction inasmuch as it keeps separate matters separate as apples are kept apart from oranges;

d) we can appreciate the Canadian Government's desire to enter, in a policy way, the field of securities legislation: we submit, however, that Canadian business is already over-legislated and that the efforts of the Canadian Government would be better directed in endeavouring to bring about uniformity of securities legislation by the Provinces rather than adding yet another level of legislation to complicate the work of the business community;

e) we are particularly concerned with certain provisions in this respect;

1)the word "explicitly" should be added and the word "matter" removed so that S. 251 (1) (a) would read:

> "....the Governor in Council may make regulations
> a) prescribing provisions explicitly required or authorized by this Act to be prescribed in relation to matters in this Act";
>
> we feel the word "matter" as currently used in the Bill can be given a dangerously wide interpretation resulting in a significant reduction in freedom of business;

2) the words "explicitly" and "by this Act" should be added to S. 251 (1) (c) so that it would read:

> "....the Governor in Council may make regulations prescribing the format and contents of annual returns, notices and other documents explicitly required by this Act to be sent or delivered to the Registrar or to be issued by him";

3) S. 251 (1) (d) appears to us to be especially dangerous inasmuch as it refers to "recognized" stock exchanges; we would not wish to see a situation where officials,

who are not elected by the people, would, in effect, have the power to "recognize" or not "recognize" stock exchanges that have been, in fact, "recognized" by the provincial authorities and the business community until now; we strongly urge that this provision be removed altogether but that if it must remain in some form, Parliament and not the Governor in Council, should have the power to list stock exchanges recognized for the purposes of this Act;

4) S.251 (1) (e) seems to be drafted in an unduly wide manner; we suggest this provision should be removed entirely inasmuch as it opens the door to non-elected officials not only in helping to implement the law but, in effect, in stating what the law is, or will be; we are of the opinion that all principles, or "rules" should be handed down by Parliament; consequently, we would suggest, if this provision is to remain at all:

i) that the word "rules" should be replaced by the words "forms and reports" and that this provision be further amended so that it will read: "prescribing forms and reports with respect to the ownership and transfer of securities of a corporation to enable the corporation to comply with this Act;

ii) that the words "to comply with the laws of the Parliament of Canada" be replaced; such words seem to us totally inappropriate inasmuch as regulations enacted under this Act should find their ultimate authority in this Act and not in the laws of Canada in general.

5) S. 251 (3) sets out a number of exceptions where the Minister is not required to publish a proposed regulation: we feel this is abhorrent to our democratic trandition; we appreciate the fact that in certain exceptional circumstances, such as during wartime there may be justification for not publishing regulations: we do not wish to extend this practice and so, if there must be Regulations under this Act, they should be published, without exception.

CONCLUSION

This Chamber is not unaware of the tendancy, in many countries of the Western world, in particular on the Continent, to have Parliament delegate to the Government or to a Minister the care of issuing Regulations or "application Decrees"; experience has taught, however, that such legislation power left in the hands of the Executive, because it transcends the traditional boundaries between the legislative and the executive powers, is fraught with many problems.

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